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 LOWLIFE CORPORATION, LTD); DALE MASTERS; and EBTM plc

UNITED STATES DISTRICT COURT OF CALIFORNIA  
 SOUTHERN DISTRICT

REALLY LIKEABLE PEOPLE, INC., a	)	CASE NO. 07 CV 2405 L CAB
Delaware corporation, LOSERKIDS, INC., a	)	
California Corporation, MACBETH, INC., a	)	MEMORANDUM OF POINTS AND
California corporation, MACBETH OPTICS,	)	AUTHORITIES IN SUPPORT OF
LP, a California limited partnership, and	)	SPECIAL MOTION TO STRIKE UNDER
REALLY LIKEABLE PEOPLE II, INC.	)	CALIFORNIA CODE OF CIVIL
(formerly ATTICUS CLOTHING, INC.), a	)	PROCEDURE SECTION 425.16
California corporation,	)	
	)	Date: March 24, 2008
Plaintiffs,	)	Time: 10:30 a.m.
	)	Courtroom: 14
vs.	)	Judge: M. James Lorenz
	)	
LOWLIFE CORPORATION, LTD, an	)	
English limited company, EVERYTHING	)	
BUT THE MUSIC, plc, an English	)	
corporation, DALE MASTERS, an	)	
individual, and DOES 1 through 25,	)	
inclusive,	)	
	)	
Defendants.	)	
	)	

Defendants LOWLIFE CORPORATION LIMITED (“Lowlife”) and DALE MASTERS (“Masters”) (collectively, “Moving Defendants”) submit the following memorandum of points and authorities in support of the special motion to strike under California Code of Civil Procedure section 425.16:

### **I. INTRODUCTION**

Defendants Lowlife and Masters hereby move, under California Code of Civil Procedure section 425.16, to strike the Third and Fourth Causes of Action alleged in Plaintiffs’ Complaint. Section 425.16, known as the anti-SLAPP (“Strategic Litigation Against Public Participation”) statute, protects against meritless claims that arise from a defendant’s free speech and petitioning activity. Pursuant to California Code of Civil Procedure section 425.16, subdivisions (b) and (e)(2), a cause of action is subject to a special motion to strike if: (1) its allegations arise from an act of the defendant in furtherance of the right of petition or free speech, including statements made in connection with a legal proceeding; and (2) plaintiff cannot meet his or her burden of showing a probability of success on the merits.

On November 13, 2007, Plaintiffs REALLY LIKEABLE PEOPLE, INC., LOSERKIDS, INC., MACBETH, INC., MACBETH OPTICS, LP, and REALLY LIKEABLE PEOPLE II, INC. (formerly ATTICUS CLOTHING, INC.) (collectively, “Plaintiffs”) filed a Complaint (the “Complaint”) in the San Diego Superior Court, Case No. 37-2007-00081582-CU-BC-CTL (“RLP v. Lowlife”) against Lowlife, Masters, and another Defendant, EVERYTHING BUT THE MUSIC,<sup>1</sup> alleging 1) Breach of Contract; 2) Breach of Implied Covenant of Good Faith and Fair Dealing; 3) Fraud in the Inducement; 4) Rescission; 5) Misappropriation of Trade Secrets; 6) Breach of Fiduciary Duty; 7) Aiding and Abetting Breach of Fiduciary Duty; 8) Intentional Interference with Contract; 9) Unfair Competition; and 10) Violation of Business & Professions Code § 17200, *et seq.* On approximately December 21, 2007, RLP v. Lowlife was removed to the United States District Court, Southern District of California, Case No. ’07 CV 2405 L CAB.

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<sup>1</sup> Defendant EVERYTHING BUT THE MUSIC is not a participant in this special motion to strike.

1 Moving Defendants' special motion to strike should be granted because: (1) the Third  
2 and Fourth Causes of Action in the Complaint arise from statements made by the Moving  
3 Defendants during settlement negotiations in a prior action and arbitration, which constitute  
4 protected activities under the anti-SLAPP statute; and (2) Plaintiffs cannot meet their burden to  
5 establish a probability of success on the merits because the Third and Fourth Causes of Action  
6 are barred by the litigation privilege.

## 7 **II. FACTUAL BACKGROUND**

8 The Complaint filed by Plaintiffs in this action arises out of earlier litigation between  
9 the parties that was settled when they entered into five different agreements.

10 The saga began on March 19, 2007, when Lowlife filed the underlying action, a  
11 Complaint for Declaratory Relief, Damages, and Imposition of Constructive Trust in the San  
12 Diego Superior Court, Case No. GIC 881995 ("Underlying Action"), against Defendants  
13 Really Likeable People, L.P. ("RLP"), Macbeth, Inc. ("Macbeth"), and others as a result of the  
14 wrongful attempted termination by RLP, Macbeth, and others of a joint venture with Lowlife  
15 for the operation of a United Kingdom website called [www.loserkids.uk.com](http://www.loserkids.uk.com), and distributor  
16 relationships with Lowlife regarding the sale in the United Kingdom and Europe of Atticus,  
17 Macbeth, and Loserkids branded products. A copy of the complaint in the Underlying Action is  
18 attached to the Notice of Lodgment as Exhibit 1.

19 The Underlying Action was settled by the execution of five agreements. The first  
20 agreement was the Heads of Agreement, signed by Lowlife, RLP and Atticus Clothing, Inc. on  
21 March 28, 2007 ("Heads of Agreement"). The Heads of Agreement gave Lowlife the option to  
22 purchase the Atticus clothing brand for \$4.2 million, and provided for the wind-down of the  
23 existing relationships between the parties. The Heads of Agreement called for the parties to  
24 enter into more detailed agreements, and if they were unable to do so they agreed to conduct an  
25 arbitration to decide any final definitive terms of said agreements. A copy of the Heads of  
26 Agreement is attached to the Notice of Lodgment as Exhibit 2.

27 On May 3, 2007, Lowlife filed a demand to arbitrate the final definitive terms and  
28 conditions of the agreements, as provided in the Heads of Agreement ("Underlying

1 Arbitration”). A copy of the demand for arbitration is attached to the Notice of Lodgment as  
2 Exhibit 3.

3 On or about May 23, 2007, counsel for the parties to the arbitration executed a  
4 Stipulation Re: Statement and Scope of Claim For Arbitration. A copy of the stipulation is  
5 attached to the Notice of Lodgment as Exhibit 4.

6 On May 29, 2007, as a result of extensive settlement negotiations that began before the  
7 signing of the Heads of Agreement, the parties executed four additional agreements to resolve  
8 the Underlying Action and the Underlying Arbitration. These four agreements were an asset  
9 purchase and sales agreement regarding the Atticus clothing brand, and three “wind-down”  
10 agreements. In the Asset Purchase and Sale Agreement (“Atticus Purchase Agreement”), dated  
11 May 29, 2007, RLP agreed to sell Atticus brand assets to Lowlife for \$4.2 million. The three  
12 “wind-down” agreements, all dated May 29, 2007, provided for 1) the wind-down of the  
13 distribution relationship between RLP and Lowlife created by the Atticus Manufacturing  
14 Agreement (“Atticus Wind-Down Agreement”); 2) the wind-down of the distribution  
15 relationship created by the Macbeth Manufacturing Agreement (“Macbeth Wind-Down  
16 Agreement”); and 3) the wind-down of the relationship between RLP and Lowlife with regard  
17 to the operation of the [www.loserkids.uk.com](http://www.loserkids.uk.com) website (“Loserkids.uk.com Wind-Down  
18 Agreement”). A copy of the Atticus Purchase Agreement is attached to the Notice of  
19 Lodgment as Exhibit 5, a copy of the Atticus Wind-Down Agreement is attached to the Notice  
20 of Lodgment as Exhibit 6, a copy of the Macbeth Wind-Down Agreement is attached to the  
21 Notice of Lodgment as Exhibit 7, and a copy of the [loserkids.uk.com](http://www.loserkids.uk.com) Wind-Down Agreement  
22 is attached to the Notice of Lodgment as Exhibit 8.

23 As a result of the settlement between the parties as set forth in the five agreements, on  
24 May 18, 2007, the Underlying Action was dismissed, and on June 5, 2007, the Underlying  
25 Arbitration was dismissed. A copy of the Underlying Action dismissal is attached to the  
26 Notice of Lodgment as Exhibit 9, and a copy of the Underlying Arbitration dismissal is  
27 attached to the Notice of Lodgment as Exhibit 10.

Plaintiffs' Third Cause of Action for Fraud claims that Lowlife and Masters made two misrepresentations during the pendency of the Underlying Action and Underlying Arbitration. Plaintiffs allege that on May 14, 2007, Lowlife, through its agent attorney Michael Riney, represented that Lowlife was working with a financing source in connection with the purchase of the Atticus assets. (Complaint, ¶ 116.) In addition, Plaintiffs allege that on May 29, 2007, Lowlife and Masters represented that Lowlife would fulfill its obligations under the terms of the wind-down agreements. (Complaint, ¶ 117.) Plaintiffs further allege that these statements were false. (Complaint, ¶ 118.) The alleged misrepresentations were made during the pendency of *both* the Underlying Action and the Underlying Arbitration, and were made during settlement negotiations that ultimately resolved the case and arbitration proceedings when the Atticus Purchase Agreement, Atticus Wind-Down Agreement, Macbeth Wind-Down Agreement, and the Loserkids.uk.com Wind-Down Agreement were signed on May 29, 2007.

The Third Cause of Action for Fraud should be stricken under the California anti-SLAPP statute because it is rooted in the negotiation, terms and implementation of the five agreements executed to settle the Underlying Action and the Underlying Arbitration. Because the Fourth Cause of Action for Rescission arises from the Third Cause of Action, and is dependent upon it, it too must be stricken.

### **III. MOVING DEFENDANTS' ANTI-SLAPP MOTION IS PROCEDURALLY PROPER**

#### **A. California's Anti-SLAPP Statute Applies in Federal Court Proceedings.**

California Code of Civil Procedure section 425.16, subdivisions (b) and (e), the subdivisions under which Moving Defendants bring this special motion to strike, are applicable in federal court in a diversity case. (*United States v. Lockheed Missiles & Space Co., Inc.* 171 F.3d 1208, 1217-1218 (9<sup>th</sup> Cir. 1999).) A special motion to strike under the anti-SLAPP statute does not conflict with the Federal Rules, including but not limited to Rules 8, 12, and 56. (*Id.* at p. 1217.) Moreover, California "has a strong interest" in the application of the anti-SLAPP statute in federal cases because its application serves the two purposes of the *Erie* rule, the

discouragement of forum shopping and avoidance of an inequitable administration of the law. (*Id.* at p. 1218.) Specifically, if defendants were precluded from utilizing the anti-SLAPP statute in federal court, plaintiffs would have incentive to shop for a federal forum, resulting in a significant disadvantage to defendants in a federal proceeding. (*Ibid.*)

**B. Moving Defendants' Anti-SLAPP Motion is Timely and is Similar to a Rule 12(b)(6) Motion.**

Subdivision (f) of California Code of Civil Procedure section 425.16 provides that a special motion to strike may be filed within 60 days after service of the complaint. Nothing in section 425.16 bars service of a special motion to strike after an answer has been filed, and California case law supports the review of motions to strike even after the answer is filed. (*See Dixon v. Superior Court* 30 Cal.App.4th 733, 739-740 (1994).) In addition, the seventh affirmative defense in the answer filed by moving defendants asserted the objection that the causes of action in the complaint are barred by California Code of Civil Procedure section 425.16. Any claim or defense sufficiently raised in state court remains at issue once the case is removed to federal court. (*Lally v. Allstate Ins. Co.*, 724 F. Supp. 760 (S.D. Ca. 1989).) The special motion to strike is timely filed.

A special anti-SLAPP motion to strike, premised on legal arguments, similar to a 12(b)(6) motion, is available in federal court. (*Rogers v. Home Shopping Network, Inc.* 57 F. Supp. 2d 973, 981 (C.D. Ca 1999).) The anti-SLAPP motion filed by the Moving Defendants is in the nature of a motion to dismiss under Rule 12(b)(6). The Third and Fourth Causes of Action are defective as a matter of law, and cannot be cured by amendment, because they arise out of the Moving Defendants' constitutionally protected activities and are based upon evidence that is inadmissible under the litigation privilege.

**IV. MOVING DEFENDANTS' MOTION UNDER THE ANTI-SLAPP STATUTE TO STRIKE THE THIRD AND FOURTH CAUSES OF ACTION OF PLAINTIFFS' COMPLAINT SHOULD BE GRANTED**

California Code of Civil Procedure § 425.16, subdivision (b)(1) provides that:  
A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United



1 States or California Constitution in connection with a public issue shall be  
 2 subject to a special motion to strike, unless the court determines that the plaintiff  
 3 has established that there is a probability that the plaintiff will prevail on the  
 4 claim.

5 Thus, when a defendant moves to strike a cause of action under subdivision (b)(1), the  
 6 court engages in a two-step process. In the first step, the court must determine whether or not  
 7 the moving defendant has made a threshold showing that the challenged cause of action arises  
 8 from that defendant's protected activity by demonstrating that the act(s) underlying the cause  
 9 of action fall within one of the categories set forth in subdivision (e) of the anti-SLAPP statute.  
 10 Once the defendant has made such a showing, in the second step of the analysis, the burden  
 11 shifts to the plaintiff to establish a probability that the plaintiff will prevail on merits of the  
 12 cause of action. (*Navallier v. Sletten*, 29 Cal. 4<sup>th</sup> 82, 88 (2002).)

13 **A. Step One: The Third and Fourth Causes of Action in Plaintiffs' Complaint Arise**  
 14 **From Defendants' Protected Activity.**

- 15 1. Defendants' oral and written statements made in connection with the negotiations  
 16 and settlement agreements in the Underlying Action and Underlying Arbitration  
 17 are protected activity under California Code of Civil Procedure section 425.16,  
 18 subdivision (e)(2).

19 Under Code of Civil Procedure section 425.16, subdivision (e)(2), statements  
 20 made in connection with an issue under consideration or review in an official  
 21 proceeding are protected activities under the anti-SLAPP statute: "As used in this  
 22 section, 'act in furtherance of a person's right of petition or free speech under the United  
 23 States or California Constitution in connection with a public issue' includes: ...(2) any  
 24 written or oral statement or writing made in connection with an issue under  
 25 consideration or review by a legislative, executive, or judicial body, or any other official  
 26 proceeding authorized by law; ..." A "person," as used in Section 425.16, includes both  
 27 natural persons and corporations. (*Mattel, Inc. v. Luce, Forward, Hamilton & Scripps*,  
 28 99 Cal. App. 4<sup>th</sup> 1179, 1188 (2002).) Moreover, for the purposes of the anti-SLAPP statute,  
 an arbitration proceeding qualifies as a judicial proceeding. (*Paul v. Friedman*, 95 Cal. App. 4<sup>th</sup>  
 853, 865-66 (2002)).

1 The California Supreme Court has held that allegedly fraudulent statements made in the  
 2 context of negotiating a settlement are protected activities that “fall squarely within the plain  
 3 language of the anti-SLAPP statute.” (*Navallier v. Sletten*, 29 Cal. 4<sup>th</sup> 82, 90 (2002) [finding  
 4 that a defendant’s allegedly fraudulent negotiation and execution of a release in a previous  
 5 action constituted protected activity under subdivision (e)(2)].) Moreover, our Fourth District  
 6 Court of Appeal, Division One has held that acts of negotiating a settlement, including  
 7 allegedly false representations made during such negotiations, are protected acts under the anti-  
 8 SLAPP statute. (*Dowling v. Zimmerman*, 85 Cal. App. 4<sup>th</sup> 1400, 1420 (2001).) This finding  
 9 has been echoed by other appellate courts as well. (*See, e.g., Navarro v. IHOP Properties, Inc.*,  
 10 134 Cal. App. 4<sup>th</sup> 834, 841-842 (2005) [holding that a defendant’s allegedly fraudulent  
 11 statements made in exchange for stipulation of judgment fell within subdivision (e)(2)].)

12 Thus, under *Navallier*, *Dowling* and *Navarro*, *supra*, all oral and written statements  
 13 made by the Moving Defendants (whether or not alleged by Plaintiffs to have been fraudulent)  
 14 during settlement negotiations in the Underlying Action and Underlying Arbitration, and the  
 15 Moving Defendants’ execution of the five agreements in settlement of the Underlying Action  
 16 and Underlying Arbitration, are protected activities under Code of Civil Procedure section  
 17 425.16, subdivision (e)(2).

18 2. Plaintiffs’ Third and Fourth Causes of Action arise from Defendants’  
 19 protected activity in negotiating and executing the settlement agreements in  
 20 the Underlying Action and Underlying Arbitration.

21 Under Code of Civil Procedure section 425.16, subdivision (b), a defendant must  
 22 demonstrate that the challenged cause of action arises from the protected act. “The statutory  
 23 phrase ‘cause of action...arising from’ means simply...that defendant’s act underlying the  
 24 plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or  
 25 free speech. In the anti-SLAPP context, the critical point is whether the plaintiff’s cause of  
 26 action itself was *based on* an act in furtherance of defendant’s right of petition or free speech.”  
 27 (*City of Cotati v. Cashman*, 29 Cal. 4<sup>th</sup> 69, 78 (2002).) “A defendant meets this burden by  
 28



1 demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out  
2 in section 425.16, subdivision (e)." (*Navallier, supra*, 29 Cal. 4<sup>th</sup> at p. 88.)

3 Moreover, Section 425.16 expressly provides that its provisions "shall be construed  
4 broadly." [Code Civ. Proc. § 425.16(a).] A defendant need only demonstrate that the  
5 "principal thrust or gravamen" of a cause of action implicates the protected activity. (*Cotati*,  
6 *supra*, 29 Cal. 4<sup>th</sup> at p. 78.) In addition, where a cause of action alleges both protected and  
7 unprotected activity, the entire cause of action will be subject to section 425.16 unless the  
8 protected conduct is 'merely incidental' to the unprotected conduct. (See *Mann v. Quality Old*  
9 *Time Service, Inc.*, 120 Cal. App. 4<sup>th</sup> 90, 103 (2004); *Philipson & Simon v. Gulsvig*, 154 Cal.  
10 App. 4<sup>th</sup> 347, 359 (2007); *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4<sup>th</sup> 294, 308  
11 (2001); see also *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*,  
12 129 Cal. App. 4<sup>th</sup> 1228, 1245 (2005)).

13 Here, the "principal thrust or gravamen" of the Third and Fourth Causes of Action is  
14 Plaintiffs' allegations that the Moving Defendants, during the negotiation of the settlement of  
15 the Underlying Action and Underlying Arbitration, made statements that Plaintiffs claim were  
16 untrue, and that such statements fraudulently induced Plaintiffs to enter settlement agreements  
17 in the underlying cases (Third Cause of Action) and entitle Plaintiffs to rescission of one of the  
18 settlement agreements (Fourth Cause of Action). As established above, *Navallier, Dowling*  
19 and *Navarro* specifically hold that such statements constitute protected acts under Code of  
20 Civil Procedure section 425.16, subdivision (e)(2). Thus, in the language of *Cotati, supra*,  
21 "defendant[s]' act[s] underlying the plaintiff[s]' cause[s] of action [were *themselves*]...act[s] in  
22 furtherance of the right of petition or free speech."

23 Therefore, Moving Defendants have met their burden to make a threshold showing that  
24 the Third and Fourth Causes of Action arise from Moving Defendants' protected acts, and the  
25 burden shifts to Plaintiffs to establish a probability of success on the merits of their claims.

26  
27  
28

**B. Step Two: Plaintiffs Cannot Prevail On The Third and Fourth Causes of Action Because These Claims Are Barred By The Litigation Privilege.**

Under California Code of Civil Procedure section 425.16, subdivision (b)(1), once the defendant has met his or her burden under Step One, the burden shifts to the plaintiff in Step Two to demonstrate that “there is a probability that the plaintiff will prevail on the claim.” (*DuPont Merck Pharmaceutical Co. v. Sup. Ct.*, 78 Cal. App. 4<sup>th</sup> 562, 567-568 (2000)). To meet his or her burden, the plaintiff must demonstrate that he or she has “stated and substantiated a legally sufficient claim.” (*Briggs v. Eden Council for Hope and Opportunity*, 19 Cal. 4<sup>th</sup> 1106, 1123 (1999), quoting *Rosenthal v. Great Western Financial Securities Corp.*, 14 Cal. 4<sup>th</sup> 394, 412 (1996)). “Put another way, the plaintiff[s] must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” (*Wilson v. Parker, Covert & Chidester*, 28 Cal. 4<sup>th</sup> 811, 821 (2002)). “[T]he evidence upon which the plaintiff bases his or her response must be admissible at trial.” (*Rogers, supra*, 57 F. Supp. 2d at p. 977.)

Here, Plaintiffs cannot meet their burden to demonstrate a probability of prevailing on the Third and Fourth Causes of Action because these claims are barred by the litigation privilege. Civil Code section 47, subdivision (b) provides that statements made in any “judicial proceeding” are privileged. Statements made orally or in writing in the course of settlement negotiations are “absolutely privileged pursuant to Civil Code section 47, subdivision (b).” (*Joseph A. Saunders, P.C. v. Weissburg & Aronson*, 74 Cal. App. 4<sup>th</sup> 869, 875 (1999); see also *Asia Investment Co. v. Borowski*, 133 Cal. App. 3d 832, 842 (1982); and *O’Neil v. Cunningham*, 118 Cal. App. 3d 466, 477 (1981).)

Where, as is the case here, the causes of action challenged by an anti-SLAPP motion are based upon allegedly fraudulent statements made during settlement negotiations, the litigation privilege prevents the plaintiff from demonstrating a probability of prevailing. In *Navarro, supra*, the Court of Appeal held that a plaintiff could not meet her burden under Step Two of the analysis under the anti-SLAPP statute because her claims, which were based upon

1 allegedly fraudulent statements made by the defendant during settlement negotiations, were  
 2 barred by the litigation privilege under Civil Code section 47, subdivision (b). (*Navarro, supra*,  
 3 134 Cal. App. 4<sup>th</sup> at pp. 845-846.) Here, as in *Navarro*, the statements at the root of Plaintiffs'  
 4 Third and Fourth Causes of Action were made during settlement negotiations to resolve a  
 5 pending lawsuit and arbitration. As a result, Plaintiffs' Third and Fourth Causes of Action are  
 6 barred by the litigation privilege set forth in Civil Code section 47, subdivision (b). Thus,  
 7 Plaintiffs cannot meet their burden to demonstrate a probability of prevailing on the Third and  
 8 Fourth Causes of Action, and Moving Defendants' special motion to strike under the anti-  
 9 SLAPP statute should be granted.

#### 10 **V. CONCLUSION**

11 The Third and Fourth Causes of Action in the Complaint arise from Defendants'  
 12 protected statements made in connection with the settlement of the Underlying Action and  
 13 Underlying Arbitration. Moreover, Plaintiffs cannot establish a probability of prevailing on  
 14 these causes of action because the claims are barred by the litigation privilege. Therefore,  
 15 Moving Defendants' special motion to strike should be granted. In addition, if their motion is  
 16 granted, Moving Defendants request that the Court make the mandatory order of attorney fees  
 17 and costs under Code of Civil Procedure section 425.16, subdivision (c).

18  
 19 Dated: February 5, 2008

SELTZER CAPLAN McMAHON VITEK

20  
 21 By: /s/ Monty A. McIntyre

22 Gerald L. McMahon  
 23 Monty A. McIntyre  
 24 G. Scott Williams  
 25 Attorney for Defendants  
 26 LOWLIFE CORPORATION LIMITED,  
 27 DALE MASTERS; and EBTM plc  
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